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IN THE

Supreme Court of the United States

October Term, 1965

No. 1252

GEORGE W. POLLEN,
Petitioner,

v.

PAUL H. PRESTON, Superintendent of Washington Asylum and Jail,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Judge and the Associate Judges of the Supreme Court:

The petitioner, addressing himself to the Court through his counsel, T. Emmett McKenzie, of Washington, D. C., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on October 6, 1965; and

Of the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on January 25, 1965, denying a rehearing, en banc, in the matter.

OPINIONS BELOW

The judgment of the Circuit Court of Appeals of October 6, 1965 has not been printed. Copy is set forth, infra.

The order of January 25, 1965, has not been printed. Copy is set forth, infra.

JURISDICTIONAL STATEMENT

The judgment of the Court below, affirming the judgment of the District Court of the United States for the District of Columbia bears date of October 6, 1965.

The order of the Court below denying appellant's petition for rehearing, en banc, is dated January 25, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254.

QUESTION PRESENTED FOR REVIEW

This cause was originally a criminal prosecution in the Court of General Sessions for the District of Columbia on a misdemeanor charge.

There was plea of not guilty and demand for trial by jury. Subsequently, counsel for defendant-petitioner, withdrew the jury demand, lacking consent of or knowledge by defendant-petitioner. There was trial by the Court; judgment of guilty and appeal taken to the District of Columbia Court of Appeals. In that appellate Court the judgment of the original court was affirmed.

Thereafter, defendant-petitioner, filed motion to set aside and vacate the judgment of the original court.

The trial court summarily denied the said motion in chambers affording defendant-petitioner no opportunity to be heard or to present any evidence or testimony in

support of his motion to set aside and vacate the judgment against him.

There was no finding or order denying relief for insufficiency as to pleading or substance—a mere naked denial.

Thereafter, and in proper time, your petitioner filed with the United States District Court for the District of Columbia his application for writ of habeas corpus.

The fundamental basis was an allegation that applicant-petitioner had been denied due process of law in being deprived of a trial by jury in the original proceeding, and that such denial of a constitutional right and privilege being the only support for petitioner's conviction and sentence was a proper subject for redress through habeas corpus proceedings.

In opposition the United States speaking through its United States District Attorney for the District of Columbia asserted that petitioner had no right to relief under habeas corpus.

In an involved argument the United States contended that

1. Petitioner had a right to take an appeal from the order denying his motion to set aside and vacate the judgment against him in the original court.

But, the government claimed, this procedure was not the sole and only remedy for habeas corpus procedure was available by constitutional and statutory provision.

2. However habeas corpus procedure could not be utilized because under title 28 section 2255, U.S.C. it was indicated or suggested or hinted-at, that habeas corpus could not be used if 28-2255 U.S.C. applied, and

In the same breath the United States stated, with citations, that 28-2255 U.S.C. did not apply in the court of general sessions.

The Court below filed no opinion but stated:

> A statement of the views of members of this Court may be filed later.

However the Court below said this much:

> * * * it appearing that appellant has failed to pursue by motion in the District of Columbia Court of General Sessions, followed by appeal therefrom to the District of Columbia Court of Appeals should such motion be denied, the remedy available to him by which to test the validity of his detention, * * *.

What this all adds up to, is this:

Lacking statutory or constitutional authority to deprive petitioner of his rights under habeas corpus procedures, the Court below has *held*, that by judicial fiat it will regard as a congressional fait accompli a non-existent law stating that where one entitled to habeas corpus procedures has at the same time another remedy—not exclusive—the court will sua sponte suspend the Privilege of the Writ of Habeas Corpus.

CONSTITUTIONAL PROVISIONS

ARTICLE I. Section 9, Clause 2.

> (cl. 2) The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or invasion the public safety may require it.

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *.

STATUTES

28 U.S.C. 2241. Power to grant writ.

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district

Courts and any circuit judge within their respective jurisdictions. * * *.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * (3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *.

28 U.S.C. 2255. Federal custody; remedies on motion attacking Sentence.

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

RULES OF COURT

Court of General Sessions for the District of Columbia
RULE 14. 1. Jury Trials.

(d) After a case has been set by the court for trial by jury, if the accused desires to withdraw his demand for trial by jury and have a trial by the judge, such accused shall, in open court, request permission of the jury judge to withdraw his demand for trial by jury, and if such request is granted, the jury judge shall certify such case for trial to the judge holding the branch of the court in which said jury trial was demanded.

STATEMENT OF THE CASE

Heretofore on March 31, 1965, appellant filed a petition for Writ of Habeas Corpus in the United States

District Court for the District of Columbia, bearing Habeas Corpus No. 147-65.

On April 5, 1965, there was a hearing upon the said petition, and on April 6, 1965, the Court entered an Order discharging the writ. This Order further provided that appellant be released upon bail in the amount of $1,000.00 which bail has been posted.

The case originated as follows:

In the District of Columbia Court of General Sessions, Criminal Division, under numbers 3271-64 and 3272-64, bearing caption United States of America v. George William Pollen, the appellant was charged with the offenses of carrying deadly weapon and assault; that thereafter on March 15, 1965, the appellant filed in the Court of General Sessions a motion to set aside and vacate the judgment.

In the District of Columbia Court of General Sessions the record shows that appellant was charged by information April 17, 1964; that retained counsel entered a plea of not guilty and demanded a jury trial; that the case was continued to May 15, and thereafter to May 21, on which date the request for jury trial was withdrawn, and the case certified to a non-jury Court; that it was continued until June 4; that it was tried before a Judge without a jury June 4, 1964, and June 5; that on June 8, 1964, appellant through new counsel, not present counsel, filed motion for judgment notwithstanding the verdict and for a new trial; that this motion was denied June 12, 1964; that appellant here was sentenced to serve 120 days on each charge, sentences concurrent; that notice of appeal to the District of Columbia Court of Appeals was filed August 6, 1964; that the appeal did not raise the question presented by the Writ of Habeas Corpus; that on February 19, 1965, the District of Columbia Court of Appeals affirmed; that on March 15, 1965, ap-

pellant, represented by present counsel, filed motion to set aside and vacate the sentence in the Court of General Sessions, raising the point presented in the Writ of Habeas Corpus; that the said motion was denied March 24, 1965; that on March 29, appellant was committed to the custody of Paul H. Preston, Superintendent Washington Asylum and Jail; and that the petition for Writ of Habeas Corpus was filed March 31, 1965.

This pleading was filed by present counsel. Trial counsel below was James K. Hughes, Esq., and no part of this pleading is intended to be any criticism of James K. Hughes, Esq., who would have testified in the District of Columbia Court of General Sessions on behalf of appellant, had that Court granted a hearing on the motion to set aside and vacate the judgment.

In said motion the appellant stated:

1. Upon the date of arraignment he was not advised by trial counsel that he was entitled to trial by jury.

2. That he was not aware that trial by jury had been demanded.

3. That thereafter when the case was called for trial before the Jury Branch of the aforesaid Court his counsel advised the Court the Jury demand was waived.

4. That counsel did not advise appellant that it was counsel's intention to waive appellant's right to a trial by jury.

5. That appellant did not desire nor consent to a waiver of trial by jury.

6. That appellant did not advise the Court below that he desired to waive a trial by jury.

7. That he was not interrogated nor addressed by the Trial Court in the matter.

8. That he has not had any experience which might have served to acquaint him on any prior occasions with the Rules of Criminal Procedure.

In his said motion to set aside and vacate the judgment the appellant charged that his subsequent trial before a Judge without a jury under the circumstances narrated had deprived him of his constitutional right to a trial by jury as provided in Amendment VI of the Constitution of the United States.

The United States speaking through its District Attorney filed a return and answer to the Writ of Habeas Corpus alleging that below appellant failed to show that he had exhausted all available legal remedies, and further alleged that the waiver of trial by jury by counsel sans knowledge, consent, or desire of the defendant effectively destroyed the defendant's right to a trial by jury under the Sixth Amendment to the Constitution of the United States.

In discharging the writ the Court below stated that the appellant here had the right to appeal from the judgment denying the motion to vacate and set aside the judgment of conviction; that Title 28-2255 USC indicates or purports to support the proposition that resort to Habeas Corpus in the instant situation is governed by the principles of law under which the Writ of Habeas Corpus is unavailable in United States District Courts unless and until the remedy provided by USC 28-2255 has been pursued to a final determination.

However the Court pointed out that in the District of Columbia Court of Appeals in 103 A.2d. 879, Ingols v District of Columbia, it was determined that Title 28-2255 USC does not apply to the District of Columbia Court of General Sessions. The Court added that in 103 A.2d. 347, Burke v. United States, the District of Columbia Court of Appeals while holding that 28-2255 USC is

not applicable in the Juvenile Court that Court had jurisdiction to entertain a motion to vacate a judgment and should under the facts in the case stated have conducted a hearing on such a motion; but the Court points out that the question presented in the instant case had not yet been before this court for decision and it was because this is a case of first impression herein that appellant was permitted to remain upon bond.

In addition appellant asserted that the procedure was in violation of Rule 14-1 of the Rules of the Court of General Sessions governing Jury Trials which requires in part that the withdrawal of a demand for Trial by Jury shall be requested by the accused in open Court whereupon if the request of the accused is granted the case shall be certified to a non jury branch of the Court.

In addition in the District of Columbia Court of General Sessions appellant stated as follows relative to the action of Trial Counsel:

> "Finally, trial counsel has stated and will say to this Court that by some inexplicable inadvertence or oversight he did not advise this defendant respecting his rights as to jury trial."

There was no response to this motion. There was never any appearance relative to the motion by the United States District Attorney's office. There was no hearing and the motion was denied in chambers, and counsel was advised of the Court's action in Chambers.

Counsel requested the Trial Judge to set a bond pending any possible appeal from the judgment dismissing the aforesaid motion. Request for bond was denied.

Thereafter, on March 31, 1965, the appellant filed his application for a Writ of Habeas Corpus in the United States District Court for the District of Columbia. The application for Writ of Habeas Corpus repeated the allegations set forth in the motion to set aside and vacate the

original judgment. The application for Writ of Habeas Corpus together with points and authorities are set forth in toto infra.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The denial of the privilege of the writ of habeas corpus as effected in this proceeding presents an important question of Federal Law which has not been, but should be, settled by this Court.

It will be noted that petitioner in his application for rehearing en banc specifically requested that the Circuit Court of appeals specify the reason for and the law applicable to its decision and it will be noted that the Court below has flatly refused to support its decision with any findings of any kind; and it is worth pointing out that the Trial Judge followed the same procedure.

The argument of the Government is simply that because 28 USC 2255 restricts resort to habeas corpus as therein set forth, habeas corpus shall be denied to all applicants whom, in the opinion of the Government should have followed the 28-2255 procedure.

Such procedure not to be followed because any law or statute or Constitutional provision or case determined in any Court of last resort commanded it, but because it suits the convenience of the Government. By examining the action of the Court below, even without opinion, the inescapable conclusion is that the Court below entertains the same legal doctrine.

The case here presented is entirely bizarre. In the trial Court there was no hearing nor were there any findings. The Court simply refused to assign any rule of law as the foundation for its ruling. The judicial act was autocratic and an absolute negation of the principle that sovereignty in this Country belongs to the citizen.

In the Court below there was a hearing and a second refusal to assign reason for the action taken.

There is no written word by any judicial officer connected with this case tending in any way to justify the action taken by reason of any legal authority.

There is no opinion from which appeal can be taken and possible errors specifically outlined and enumerated.

The situation presented does not lend itself to briefing because (1) there is no legal authority for the action of the Court below; (2) the result reached was obtained by conclusion that 28 USC 2255 being inapplicable to the situation here presented nevertheless serves to suspend the privilege of habeas corpus.

As far as the writer of the brief can envisage citation of required authority, it appears that the Constitutional and Statutory authorities herein relied upon and the naked judgment of the Court below sufficiently establish petitioner's case; and that if there be any justification for the existing judgment it is a clear imperative burden of the Government to furnish it.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1965

Habeas Corpus 147-65

United States Court of Appeals for the District of Columbia Circuit, filed Oct. 6, 1965, Nathan J. Paulson, Clerk

No. 19,350

GEORGE W. POLLEN, APPELLANT

v.

PAUL H. PRESTON, Superintendent, Washington Asylum and Jail, APPELLEE

Appeal from the United States District Court for the District of Columbia.

BEFORE: WILBUR K. MILLER, Senior Circuit Judge, and FAHY and BURGER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

It appearing that on February 19, 1965, the District of Columbia Court of Appeals affirmed appellant's conviction on appeal from the District of Columbia Court of General Sessions (*Pollen* v. *United States*, 207 A.2d 114 [D.C. Ct. App. 1965]), and it further appearing that appellant has failed to pursue by motion in the District of Columbia Court of General Sessions, followed by appeal therefrom to the District of Columbia Court of Appeals should such motion be denied, the remedy available to him by which to test the validity of his detention,

Now on consideration whereof It is ORDERED AND ADJUDGED by this court that the judgment of the

District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: Oct. 6, 1965.

A statement of the views of members of the Court may be filed later.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1965

Habeas Corpus 147-65

United States Court of Appeals for the District of Columbia Circuit, filed Jan. 25, 1966, Nathan J. Paulson, Clerk

No. 19,350

GEORGE W. POLLEN, APPELLANT

v.

PAUL H. PRESTON, Superintendent, Washington Asylum and Jail, APPELLEE

BEFORE: BAZELON, Chief Judge; and FAHY, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM, and LEVENTHAL, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellant's aforesaid petition is denied.

Per Curiam.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1252

GEORGE W. POLLEN, PETITIONER

v.

PAUL H. PRESTON, SUPERINTENDENT, WASHINGTON ASYLUM AND JAIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965. A petition for rehearing *en banc* was denied on January 25, 1966. The petition for a writ of certiorari was filed on April 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

218-653—66

QUESTION PRESENTED

Whether petitioner could obtain review in a district court of the denial by the District of Columbia Court of General Sessions of his motion to vacate sentence when he had not appealed from that denial to the District of Columbia Municipal Court of Appeals.

STATEMENT

On April 17, 1964, petitioner was charged by information in the District of Columbia Court of General Sessions with simple assault and with carrying a dangerous weapon, in violation of 22 D.C. Code 504 and 3204. He entered a plea of not guilty and demanded a jury trial. On May 21, 1964, petitioner's retained counsel withdrew the demand for a jury trial. On June 4–5, petitioner was tried and convicted on both charges by a judge of the Court of General Sessions sitting without a jury. On July 28, he was sentenced to jail for a period of 120 days on each count, to run concurrently, with the proviso that credit would be given for some 35 days already spent in custody. Appeal was taken on various grounds unrelated to petitioner's waiver of a jury trial. The District of Columbia Municipal Court of Appeals affirmed the convictions on February 19, 1965. *Pollen* v. *United States,* 207 A. 2d 114.

On March 15, 1965, petitioner, with newly retained counsel, filed a motion in the Court of General Sessions to set aside and vacate the sentences on the ground that he had not intelligently waived his right to a jury trial. This motion was denied without a hearing on March 24, 1965, and petitioner was taken into custody on March 29, 1965. On March 31, peti-

tioner applied in the United States District Court for the District of Columbia for a writ of habeas corpus, alleging that he had been denied a jury trial without intelligent waiver.[1] The district court dismissed the petition on the ground that petitioner had failed to exhaust his available legal remedies. It set bail pending appeal at $1000 (J.A. 13). The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal *per curiam*, noting that a motion to vacate sentence and appeal from a denial thereof to the District of Columbia Municipal Court of Appeals was the "remedy available * * * by which to test the validity of [petitioner's] detention" (Pet. App. 13–14).

ARGUMENT

The district court correctly concluded that petitioner must exhaust his remedy of appeal to the District of Columbia Municipal Court of Apepals from the denial of his motion to vacate sentence before habeas corpus would be available (Pet. 11–12). A motion to vacate sentence in the Court of General Sessions is similar in nature and scope to the federal proceeding under 28 U.S.C. 2255.[2] Rule 27(d) of the Rules of the District

[1] At the time when the petition for habeas corpus was filed, the time for appeal (ten days) from the denial of the motion to vacate sentence had not lapsed. Rule 27 (b), (d) of the Rules of the District of Columbia Municipal Court of Appeals.

[2] The District of Columbia Municipal Court of Appeals has held that 28 U.S.C. 2255 is not applicable to the Court of General Sessions but that that court has the inherent power to entertain a motion to vacate a sentence. *Ingols* v. *District of Columbia*, 103 A. 2d 879 (D.C. Mun. Ct. App.); see *Burke* v. *United States*, 103 A. 2d 347 (D.C. Mun. Ct. App.); *cf. Morgan* v. *United States*, 346 U.S. 502.

of Columbia Municipal Court of Appeals provides for appeal of an adverse ruling on such a motion. Resort to habeas corpus under these circumstances is clearly improper (*United States* v. *Hayman,* 342 U.S. 205; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269; *United States ex rel. Kennedy* v. *Tyler,* 269 U.S. 13) since the remedy provided by habeas corpus is not intended to bypass orderly procedures in local court systems. *Fay* v. *Noia,* 372 U.S. 391, 418–420; *Wade* v. *Mayo,* 334 U.S. 672, 677–680; *Ex parte Hawk,* 321 U.S. 114, 116–118; *Mooney* v. *Holohan,* 294 U.S. 103. By applying for habeas corpus in the district court, petitioner has, in effect, sought review in that court of a decision of the Court of General Sessions, whereas such review has been assigned by Congress to the District of Columbia Municipal Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1966.

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